MALAYSIA & NIPPON INSURANS BHD

v.

LOW BUCK NGOH & ANOR

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[CIVIL APPEAL NO: 12-53-2004]
11 JULY 2005

CIVIL PROCEDURE: *Summary judgment - Appeal against - Statutory notice - Whether duly and legally served on defendant - Whether defendant had notice of civil proceedings - Road Transport Act 1987, s. 96(2)(a) - Whether defendant as insurer liable to pay third party entitled to benefit of judgment obtained against insured person - Whether defendant raised triable issues*

This was an appeal by the appellant/defendant ('the defendant') against the decision of the sessions court judge entering summary judgment in favour of the respondents/plaintiffs ('the plaintiffs') under O. 26A of the Subordinate Courts Rules 1980. The background facts were that the plaintiffs had filed a civil action against one Jaes Abdullah, driver of the motor lorry involved in a motor vehicle accident and his employer Bina Bumi Construction ('the civil proceedings'). The plaintiffs' solicitors had on 10 September 2001 issued a notice pursuant to s. 96(2) of the Road Transport Act 1987 ('the statutory notice') by registered post, informing the defendant of their intention to institute civil proceedings. The defendant was the insurer at the material time. When the driver and his employer failed to appear in court, interlocutory default judgment was entered in favour of the plaintiffs. Subsequently, the driver and his employer failed to attend the assessment of damages hearing and damages and interests plus costs were awarded in favour of the plaintiffs. The plaintiffs' solicitors had, on 11 September 2002, served a copy of the judgment on the defendant but the latter had failed to fulfill its responsibilities as the insurer and did not satisfy the judgment. Pursuant to the plaintiffs' application in the recovery action, the sessions court judge entered summary judgment against the defendant and hence, this appeal. The issues that arose herein were (1) whether defendant had notice of the civil proceedings in which the judgment was given and (2) whether there were triable issues.

Held (dismissing the appeal):

[1] The statutory notice had been duly and legally served on the defendant and the defendant had notice of the proceedings in which the judgment was given. The defendant had not disputed the effective service of the summons on the defendant at exactly the same address as that stated in the statutory notice. The sessions court judge had been correct in rejecting the defence's submission to the contrary. Section 96(2)(a) of the Road Transport Act 1987 renders an insurer who had notice of the civil proceedings such as the defendant herein liable to pay a third party who is entitled to the benefit of a judgment obtained against an insured person, by way of an exception to the doctrine of privity of contract, thereby allowing recovery of a judgment sum by a person who was not a party to the contract. (p 15 d-f)

[2] This was a recovery action by the plaintiffs against the defendant as the insurer pursuant to the judgment against the driver and his employer. The driver and his employer's application to set aside the judgment had been dismissed by the sessions court. Although there was an appeal against the judgment to the High Court Seremban, there was no order for stay of execution of the judgment. The judgment was binding on the parties thereto. Any attempt to set aside the judgment must perforce be made by the driver and his employer in the proceedings in which the judgment had been given. The defendant herein as the insurer was not at liberty to reopen it by way of a collateral issue in this recovery action. The defendant's submissions had raised no triable issue at all. (p 16 a-c & f)

Case(s) referred to:

Rafiah Bakar v East West-UMI Insurance Bhd [1993] 1 CLJ 431 HC ***(refd)***
Pacific & Orient Insurance Co Bhd v. Rusnah Abd Raop [2003] 6 MLJ 113 ***(refd)***
Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v. Goh Thiam Hock [1999] 1 MLJ 179 ***(refd)***
Pembinaan KSY dn Bhd v Lian Seng Properties Sdn Bhd [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 SC ***(refd)***
The Chartered Bank v Yong Chan [1974] 1 MLJ 157 ***(refd)***
Janagi v Ong Boon Kiat [1971] 2 MLJ 196 ***(refd)***

Legislation referred to:

Companies Act 1965, s. 350
Road Transport Act 1987, s. 96(2)(a)
Subordinate Courts Rules 1980, O. 7 r. 15, O. 26A

For the plaintiffs - KB Tan; M/s KB Tan, Kumar & Partners
For the defendant - M Nathan; M/s Lawrence Pereira & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal by the appellant-defendant ("the defendant") against the decision of the learned sessions court judge who had on 4 June 2004 entered summary judgment in favour of the respondents-plaintiffs ("the plaintiffs") under O. 26A of the Subordinate Courts Rules 1980.

For brevity and convenience, a reference hereinafter to an order and a rule is a reference to that order and rule in the Subordinate Courts Rules 1980 and a reference to a section is a reference to that section in the Road Transport Act 1987 unless otherwise stated.

Factual Background

The plaintiffs' claim against the defendant is by way of a recovery action.

Vide Seremban Sessions Court Summons No. 53-541-2001 dated 29 September 2001, the plaintiffs had filed a civil action against one Jaes bin Abdullah as the driver of the motor lorry involved in a motor vehicle accident on 6 October 1998, and his employer Bina Bumi Construction ("the civil proceedings").

The plaintiffs' solicitors had on 10 September 2001 issued a notice pursuant to s. 96(2) of the Road Transport Act 1987 ("the statutory notice") by registered post, informing the defendant of the plaintiffs' intention to institute the civil proceedings as the defendant was at the material time the insurer.

The plaintiffs' summons was fixed for mention for 9 November 2001 but it had to be postponed as the sessions court judge was on leave and it was rescheduled for 6 December 2001 for further mention. The plaintiffs' solicitors had *vide* registered letter dated 16 November 2001 notified the driver and his employer of the new mention date ie, 6 December 2001.

However, on 6 December 2001, the driver and his employer failed to appear in court, as a result of which the court has entered interlocutory default judgment in favour of the plaintiffs.

The plaintiffs' solicitors had *vide* registered letter dated 7 February 2002 served a sealed copy of the interlocutory default judgment on the driver and his employer. That judgment had stated, *inter alia*, that the assessment of damages had been fixed for 20 February 2002 but the driver and his employer did not attend; and assessment was proceeded with. After hearing, damages, interest and costs had been awarded on 12 July 2002 in favour of the plaintiffs, as at pp. 60 to 63 of the appeal record ("the judgment").

As the defendant was at the material time the insurer, the plaintiffs' solicitors had on 11 November 2002 served a copy of the judgment on the defendant, but the defendant had failed, refused and neglected to fulfil its responsibilities as the insurer and had not satisfied the judgment.

On 4 June 2004, pursuant to the plaintiffs' application in the recovery action, the sessions court judge entered summary judgment against the defendant under O. 26A.

Notice To Insurer

Mr. M. Nathan, learned counsel for the defendant, submitted that the plaintiffs' solicitors have not sent and could not have sent the statutory notice by registered post or otherwise to the defendant and that the defendant had not received it, in which case the defendant is not liable to satisfy the judgment.

For the plaintiffs, learned counsel Mr. KB Tan responded that the plaintiffs had complied with s. 96(2)(a) by giving the defendant the statutory notice, thereby relying on s. 350 of the Companies Act 1965; and O. 7 r. 15.

The issue for determination in this respect is whether the defendant has notice of the civil proceedings in which the judgment was given.

Upon a proper perusal of the statutory notice, I find that it had been sent by registered post and addressed to the defendant at Level 25, Menara Citibank, 165 Jalan Ampang, Kuala Lumpur. The posting receipt had also been exhibited.

There was no submission by the defendant that this address was not the registered office of the defendant. In fact the defendant's statement of defence admitted that this is the defendant's registered office.

Section 96(1) provides generally for the duty of insurers to satisfy judgments against persons insured in respect of third party risks. It is significant to note that s. 96(2)(a) specifically creates an exception unless the insurer had notice of the proceedings. Section 96(2)(a) reads as follows:

(2) No sum shall be payable by an insurer under subsection (1):

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the proceedings;

For the purpose of determining whether the defendant herein has notice of the civil proceedings, I find it useful to refer to s. 350 of the Companies Act 1965; and O. 7 r. 15.

Section 350 of the Companies Act 1950 where relevant provides that a document may be served on a company by eg, sending it by registered post to the registered office of the company, while O. 7 r. 15 permits the service of a document to be effected eg, by post where a document is not required to be served personally.

On the facts, there can be no doubt in my mind that the statutory notice had been duly and legally served on the defendant and that the defendant had notice of the proceedings in which the judgment was given. As a matter of fact, the defendant has not disputed the effective service of the summons on the defendant at exactly the same address as that stated in the statutory notice. That being the case, the sessions court judge is correct in rejecting the defence submission to the contrary.

Section 96(2)(a) renders an insurer who had notice of the civil proceedings such as the defendant herein liable to pay a third party who is entitled to the benefit of a judgment obtained against an insured person, by way of an exception to the doctrine of privity of contract, thereby allowing recovery of a judgment sum by a person who is not a party to the contract. (See also *Rafiah bte Bakar v. East West-UMI Insurance Bhd* [1993] 1 CLJ 431 per James Foong J (now JCA); *Pacific & Orient Insurance Co Bhd v. Rusnah Abd Raop* [2003] 6 MLJ 113 at p. 120G-H per Kang Hwee Gee J; and *Talasco Insurance Bhd (formerly known as Talasco Insurance Sdn Bhd) v. Goh Thiam Hock* [1999] 1 MLJ 179 at p. 185D-G per Suriyadi J).

Negligence Of Driver

It was argued for the defendant that the driver of the motor lorry had not been negligent at all and so there were merits in the defence case.

The stand taken for the plaintiffs is that the driver and his employer had never applied to set aside the judgment.

In my view, it is to be observed that this is a recovery action by the plaintiffs against the defendant as the insurer pursuant to the judgment against the driver and his employer. The driver and his employer's application to set aside the judgment had been dismissed by the sessions court. Although there was an appeal against the judgment to the High Court Seremban, there was no order for stay of execution of the judgment. In my view, the judgment is binding on the parties thereto. Any attempt to set aside the judgment must perforce be made by the driver and his employer in the proceedings in which the judgment had been given. The defendant herein as the insurer is not at liberty to reopen it by way of a collateral issue in this recovery action.

In *Pembinaan KSY dn Bhd v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 263; [1991] 1 CLJ (Rep) 343 the then Supreme Court held that a default judgment until set aside is a good and enforceable judgment: per Hashim Yeop A Sani CJ (M) (as he then was).

More importantly, it is trite law that the parties' pleadings are binding on them: see eg, *The Chartered Bank v. Yong Chan* [1974] 1 MLJ 157; and *Janagi v. Ong Boon Kiat* [1971] 2 MLJ 196. In order to ensure that there is no deviation from the pleadings, it is necessary for me to examine the amended defence filed for the defendant. Upon an analysis thereof, I am unable to find any averment whatsoever in relation to the absence of negligence on the part of the driver. It is not permissible for the defendant to travel outside the amended defence and there is no necessity for me to consider this unpleaded issue.

Conclusion

The defendant's submission has raised no triable issue at all. I hold that the sessions court judge is correct in entering summary judgment for the plaintiffs, which I now affirm. As the defendant's appeal is devoid of merits, it is hereby dismissed with costs.